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Customary Law of the Sea: Advocacy or Disinterested Scholarship?

W. T. Burke†

These comments focus on the most significant feature of Part V of the Restatement (Third) of Foreign Relations Law— the mistreatment of customary international law. Whether uniform state practice comprising customary law exists, and what that practice entails, are significant questions for critical law of the sea issues such as navigation rights. These questions are important because the 1982 Convention on the Law of the Sea, nearly seven years after adoption, still has insufficient ratifications to come into force. The importance of these questions of customary law has increased in light of U.S. rejection of the Convention. In general belief, the Convention’s provisions on navigation are of special benefit to U.S. interests. Despite this benefit and other advantages conferred upon it by the Convention, however, the Reagan Administration announced U.S. rejection within a few months of the Convention’s overwhelming adoption.

Even as the United States was rejecting the Convention, President Reagan was asserting that much of the treaty served the interests of all...

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3. The Convention had 119 original signatories. Id. at 190. The Convention will enter into force twelve months after the date of deposit of the sixtieth instrument of ratification or accession. Id. at 308. As of December 31, 1988, there were 37 parties to the treaty. Multilateral Treaties Deposited with the Secretary General at 752-53, U.N. Doc. ST/LEG/SER.E17, U.N. Sales No. E.89.v.3 (1989).

nations. In March, 1983, the United States proclaimed an exclusive eco-
nomic zone, and in an accompanying statement declared that Conven-
tion provisions on traditional uses of the ocean generally confirmed
"existing maritime law." The principal objective of these statements
was to establish that the critical parts of the treaty dealing with naviga-
tion rights were available for protection of U.S. interests because they
were existing, i.e., customary, international law. Thus, determination of
the existence and details of customary international law of the sea is criti-
cal to the achievement of this objective. However, it is one thing for the
United States to announce its view of customary law; it is quite a differ-
ent matter to determine whether that view is an accurate and acceptable
statement of state practice.

Despite the critical role that customary law plays in the law of the sea,
the Restatement mistreats it in several ways. First, by declaring that
some principles have that quality when there is no evidence that custom-
ary international law has anything effective to say on the matter; second,
by declaring unqualified customary law principles when the evidence of
state practice is unclear at best; and finally, by identifying principles as
customary law which are supported only by distorted and misleading
characterizations of sources. The main problem is not in the accuracy
of reporting the customary law of the sea as perceived by the United
States, although there may be inaccuracies of this kind, but rather in the
endorsement by the Restatement that these perceptions are accurate re-
flections of customary international law on the point in issue.

The Restatement declares that the "international law restated here de-
rives largely from customary international law and international agree-
ments to which the United States is a party." The American Law
Institute’s views as to what constitutes “sources of international law”
and “evidence of international law” are set forth in sections 102 and 103.
According to section 102(2), “[c]ustomary international law results from
a general and consistent practice of states followed by them from a sense
of legal obligation.” Section 103 identifies the means for proving that a

5. Statement by the President on the Convention on the Law of the Sea, 18 WEEKLY
COMP. PRES. DOC. 887 (July 9, 1982).
6. Proclamation 5030 by the President on the Exclusive Economic Zone of the United
States, 19 WEEKLY COMP. PRES. DOC. 384 (Mar. 10, 1983).
7. Statement by the President on United States Oceans Policy, id. at 383.
8. This review does not deal with assumptions about the value of a “restatement” of cus-
tomary law. Apart from the utility of an adequate study of state practice and a description of
doctrine derived from that study, questions can certainly be raised about the extent of helpful
guidance thereby provided for future decisions. The author's comments do not address this
latter problem.
9. RESTATEMENT (THIRD) at 3.
rule has become one of international law: "[F]or customary law the 'best
evidence' is proof of state practice, ordinarily by reference to official doc-
uments and other indications of governmental action.... Subsection (2)
refers to secondary evidence indicating what the law has been found to be
by authoritative reporters and interprêters."

In most of Part V, the Restatement makes no attempt to provide either
the details of the alleged state practice which would support its assertions
about customary law or to cite the evidence that might confirm that the
designated practices occur as claimed. The introductory note perhaps
contains the explanation for this. After noting that the Convention is not
law for the United States, it states that many of the principles therein are
customary law and "influenced, and came to reflect, the practice of
states."10 It further notes that the United States

[a]greed to accept the substantive provisions of the Convention, other than
those dealing with deep sea-bed mining, in relation to all states that do so
with respect to the United States. Thus, by express or tacit agreement ac-
accompanied by consistent practice, the United States, and states generally,
have accepted the substantive provisions of the Convention... as state-
ments of customary law binding upon them apart from the Convention.11

This important passage attempts to combine alleged mutual accept-
ance of treaty provisions, ignoring the manner of the acceptance in a
package deal,12 with unidentified but supposedly uniform state practices.
Entirely apart from overlooking the package deal characteristics of the

11. Id. In a footnote, the reporters note that disagreement exists on some provisions of the
Law of the Sea Convention, specifically articles 64, 67, 82, articles 76 and 82 together, Part XI,
and articles “establishing new institutions and a system for settling disputes arising under the
Convention.” Id. pt. V, introductory note at 6 n.6.
12. The meaning and significance of the package deal may be seen in the final statement of
President Koh when he referred to the final statements of delegations in the last four days of
the Conference. President Koh noted:

47. The second theme which has emerged from the statements is that the provisions of
the Convention are closely interrelated and form an integral package. Thus it is not
possible for a State to pick what it likes and to disregard what it does not like. It was
also said that rights and obligations go hand in hand and it is not permissible to
claim rights under the Convention without being willing to shoulder the correspond-
ning obligations.

48. The third theme I have heard is that this Convention is not a codification conven-
tion. The argument that, except for Part XI, the Convention codifies customary law
or reflects existing international practice is factually incorrect and legally insupport-
able. The régime of transit passage through straits used for international navigation
and the régime of archipelagic sea lanes passage are only two examples of the many
new concepts in the Convention.

Third United Nations Conference on the Law of the Sea (11th sess.) at 135-36,
(1984). See also Caminos & Molitor, Progressive Development of International Law and the

510
Restatement: Law of the Sea

1982 Convention, these general allegations about the practice of states can hardly satisfy the burden of providing adequate documentation of state practice to establish customary international law principles. The introductory note further seeks to substantiate the Restatement's approach by referring to the passage in the Gulf of Maine decision which purportedly states “that the provisions of the Law of the Sea Convention on the continental shelf and exclusive economic zone ‘were adopted without any objections’ and may ‘be regarded as consonant at present with general international law on the question.’”

The introductory note's explanation for the absence of support accompanying assertions of customary law is entirely unsatisfactory. Yet the Restatement thereafter employs bare declarations that state practice establishes a particular principle, and the reader is expected to accept that the requisite practice and sense of obligation exist and may be verified. On significant occasions, such as on questions about navigation rights,

13. Restatement (Third) pt. V, introductory note at 5 (quoting Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246, 294 (Judgment of Oct. 12)). Two points about this quotation are notable. First, this is a very selective quotation, an approach employed elsewhere in Part V of the Restatement. What the Court actually said was that “certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without objection.” 1984 I.C.J. at 294 (emphasis added). The Court was not addressing all of the provisions of the Convention dealing with the shelf or the exclusive economic zone, let alone the myriad other provisions alleged by the Restatement to be customary law, but only the delimitation provisions. The Court's final observation was: “In the Chamber's opinion, these provisions, even if in some respects they bear the mark of the compromise surrounding their adoption, may nevertheless be regarded as consonant at present with general international law on the question.” Id. The “question” in this instance was delimitation of a maritime boundary.

Second, no votes were taken on individual provisions of the Convention. Thus, the reference by the Court to “without objection” cannot be taken literally to refer to everything within the Convention, because there were specific and strongly felt objections to some provisions despite the absence of votes to document them. Since the conference record encompasses 17 volumes, the quickest way to identify many of the most important of these objections is to consult the closing statements in the final session. See U.N. Doc. A/Conf.62/17, supra note 12, at 14-132. Not all of the serious objections will appear in these statements. But the point is captured succinctly in the observation by the representative of Singapore: “There are few countries indeed that do not have serious objections of one kind or another to particular parts of the Convention.” Id. at 28.

At the Law of the Sea Conference, a state's “objection” to a treaty provision was a function of its stance and the negotiations and tradeoffs into which it entered as revealed in the conference records. Recognizing these considerations is vital for maintaining the integrity of the negotiating process and the resulting Convention. If acceptance of a package deal, later repudiated by one party to it, still binds the others to the entire package because it is somehow transformed into customary law, we are not likely to see package deals made in the future. Accordingly, the above statement by the Court in the Gulf of Maine needs to be taken with considerable caution, for this reason alone if no other. We are not only dealing with customary law but with the entire process of creating international law, including by agreement. It is for this reason, also, that the Restatement's facile reliance on supposed consensus at the LOS Conference cannot be accepted. See generally Caminos & Molitor, supra note 12.

511
the reader would be well advised to make an independent investigation and not rely initially on the Restatement. The Restatement is occasionally more forthcoming in identifying what it considers relevant secondary sources of evidence for customary law. Unfortunately, in some instances, such as access to ports, these sources are seriously distorted, and an independent assessment indicates that they do not support the conclusions for which they are cited.14

The cumulative effect of these deficiencies is to cast substantial doubt on some of the most important pronouncements in Part V and, unavoidably, upon Part V as a whole. This reviewer would advise lawyers and courts consulting Part V to conduct their own search for evidence of customary law and to accept the Restatement's black-letter rules and reporters' commentaries and notes only after independent confirmation. Unfortunately, Part V simply is not an authoritative source for some of the most important propositions stated therein.

One of the most significant aspects of the 1982 Law of the Sea treaty is its treatment of navigation rights. From the beginning of the Law of the Sea treaty negotiations in the late 1960s, the negotiating strategies of the United States and the Soviet Union, as the most important naval powers, were dominated by the objective of protecting navigation rights in straits and any new jurisdictional zones, such as the exclusive economic zone and archipelagic waters.15 No one questions the two principles of traditional law that submarines in innocent passage must travel on the surface of the territorial sea, whether in or out of straits, and that state aircraft have no right to fly over any part of the territorial sea. In its traditional form, however, the law applicable to passage and overflight in the territorial sea was considered seriously adverse to the effective movement of submarines and military aircraft in and over a territorial sea of 12 nautical miles, the limit that was generally considered desirable for the 1982 Convention. These traditional edicts explain the emphasis by the maritime powers on the necessity for including, in the 1982 Law of the Sea treaty, the right of transit passage in straits. Few now question that the straits and archipelagic waters provisions of the Law of the Sea treaty reasonably secure the navigation rights demanded by the United States and the Soviet Union. Rejecting the treaty was, therefore, problematic for the United States. To secure the protection afforded by the treaty's transit passage and archipelagic sea lanes provisions, the United States had to claim that such provisions were already customary law.

14. See infra notes 44-46 and accompanying text.
15. See sources cited supra note 4.
While the U.S. position is understandable in light of its rejection of the Law of the Sea treaty, the question still remains whether the Administration can document the state practices in question sufficiently to persuade independent observers of the legitimacy of its position. As of this writing, no attempt to provide such documentation has been made, although some former Law of the Sea treaty negotiators contend that long-established practice is sufficient to demonstrate that the new passage regimes are already recognized as customary law. Because information about law of the sea issues in recent state practice is scarce, and non-governmental observers in the United States have little or no access to reliable data, it is impossible to know what communications have come to the United States from other states about this issue. It is also impossible to know how state practice has evolved since 1982. At least one emphatic rejection of the U.S. position—that by Canada in adopting its new position on the Northwest Passage—is, however, now known.

A mark of the weakness of the U.S. position on the customary law of navigation rights is that the Restatement not only makes no attempt to cite evidence of state practice but is apparently untroubled with the lack of any real information on the issue. The Restatement simply continues to do what the Reagan Administration began in 1982: namely, to insist


17. Apart from selected incidents summarized in various issues of the American Journal of International Law, documentation of U.S. practice in international law has not been available since the 1979 volume of the Digest of United States Practice in International Law which was released in 1983. Office of the Legal Advisor, Dep't of State, Digest of United States Practice in International Law (M. Nash ed. 1979). U.S. protests to other nations are not routinely released or available, and it is rare for protests to the United States from other states to be officially released by the State Department. Accordingly, the record of state practice, as determined by the actions of the United States and the reactions of other nations, is most difficult to ascertain. The author has seen a list of 40 U.S. protests from 1981 to 1987 and the contents of some protest messages which were privately circulated in 1988 by the Council for Ocean Law, but cannot determine whether this is a complete list. No mention was made in the list of protests received.

18. Canada's adoption of a straight baseline system enclosing the Arctic archipelago followed immediately upon the transit of the Northwest Passage by the U.S. Coast Guard icebreaker Polar Sea in the summer of 1985, which caused an immense furor in Canada. This authoritative claim to transform the Northwest Passage into internal waters is completely inconsistent with a claim that the passage is a part of the territorial sea or an exclusive economic zone open to international navigation. Although the United States and Canada have papered over this dispute with an Agreement on Arctic Cooperation, the United States has not accepted the Canadian legal position. For a discussion of Canadian perspectives regarding the Northwest Passage and Arctic archipelago, see Pharand, Canada's Sovereignty over the Newly Enclosed Arctic Waters, XXV CANADIAN Y.B. INT'L L. 325 (1987) (discussing events through January, 1988). For a more comprehensive discussion, see D. Pharand, Canada's Arctic Waters in International Law (1988); McDorman, In the Wake of the Polar Sea: Canadian Jurisdiction and the Northwest Passage, 10 MARINE POL. 243 (1986).
that customary law, based on recent unidentified state practice and the conclusion of the Law of the Sea treaty, provides for the navigation rights in question. For example, section 513 provides that "[i]n straits used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone, all ships and aircraft enjoy the right of transit passage, which the coastal state may neither suspend nor impede.

Similarly, comment j declares that "[r]ecent practice of states, supported by the broad consensus achieved at the Third United Nations Conference on the Law of the Sea, has effectively established as customary international law the concept and the basic rules of transit passage through international straits and sea-lanes passage through archipelagic waters."

If there is any evidence in actual practice for this proposition, it does not, despite its importance, appear in the Restatement. Nor will the reader find any significant reference to secondary sources supporting the purported customary law principles. Such an omission of evidence is serious because it concerns a section of the Law of the Sea treaty that is of the utmost significance to U.S. policy. It is conceivable that state practice is evolving toward acceptance of the principles agreed upon in the treaty, and it would be valuable to have that tendency identified and confirmed. On the other hand, it is at least as likely, if not more so, that the reverse is occurring. Confirmation of the reverse development would also be valuable, for we would then know better how important the Law of the Sea treaty is for navigation interests. The continued obscurity on

19. Depending upon what is meant by "recent," this approach apparently differs from that espoused by Harlow, supra note 16. The most intensive examinations of state practice in straits, perhaps to be classified as "recent," are those in the series International Straits of the World, edited by Gerard Mangone. All of the following studies conclude that the applicable regime in straits, under traditional international law, was innocent passage. W. Butler, Northeast Arctic Passage 137-43 (1978); M. Leifer, Malacca, Singapore and Indonesia 86-104 (1978) (The conclusions here are hazy but appear to identify innocent passage as the applicable regime apart from agreement otherwise.); S. Truver, The Strait of Gibraltar and the Mediterranean 159-83 (1980); G. Alexandersson, The Baltic Straits 81-90 (1982); R. Lapidoth-Eschelbacher, The Red Sea and the Gulf of Aden 143, 146-49 (1982); L. Cuyvers, The Strait of Dover 46-54 (1986); C. Young Pak, The Korean Straits 75-76 (1988) (noting that both Japan and Korea have refrained from extending their territorial sea to straits in order to avoid a problem with the USSR; such inaction indicates that the regime would probably be innocent passage).

20. Restatement (Third) § 513 comment j. In this connection the 1982 congressional testimony of the deputy head of the U.S. delegation should be recalled. He stated that assertions made by the United States, claiming the right of transit passage through straits to be a rule of customary law, rested on insubstantial grounds. He also suggested that to understand the actual U.S. position on this matter required access to classified information. Hearings on the Status of the Law of the Sea Treaty Negotiations Before the Subcomm. on Oceanography and the House Comm. on Merchant Marine and Fisheries, 97th Cong., 2nd Sess. 236 (1982) (statement of Leigh S. Ratiner, former Deputy Chairman, U.S. Delegation to the Law of the Sea Conference).
Restatement: Law of the Sea

this point is disappointing, as is the apparent willingness of the Restatement to rely upon inadequate sources or upon politically inspired statements.

The Restatement’s treatment of the right of transit passage in straits is not an isolated example of its failure to provide supporting evidence for declarations about customary law. Another concerns warships and the right of innocent passage. Section 513(1)(a) provides that “[s]hips of all states have the right of innocent passage through the territorial sea of any coastal state.” Comment h says that “[w]arships enjoy the right of innocent passage,” leaving it to the reporters’ notes to disclose that some states dissented from this provision in the Law of the Sea treaty negotiations.21 In fact, although the Law of the Sea treaty provides (as does the 1958 Convention on the Territorial Sea and Contiguous Zone) that “all ships” have the right of innocent passage,22 there has always been substantial dissent from this view and, if anything, such dissent has intensified since 1958.23

The number of states in the Third Conference which were dissatisfied with the inclusion of warships within the right of innocent passage is difficult to establish with certainty. At a minimum the group included the 28 who cosponsored an inconsistent amendment, but some estimates include as many as 80 countries.24 Twelve of the cosponsors of this amendment are not listed among the 39 states identified by the United

22. Convention on the Territorial Sea and the Contiguous Zone, supra note 4, art. 14, 15 U.S.T. at 1610, 516 U.N.T.S. at 214. Curiously, the Restatement in § 513 omits the “all” which is a critical term in the context of assertions that one particular class of ships is not entitled to the right of innocent passage.
23. See 4 M. Whiteman, Digest of International Law 404-17 (1965); M. McDougal & W. Burke, The Public Order of the Oceans lxviii-1xix, 214-21 (1987); see also Clingan, supra note 4, at 112.
24. At the last session of the conference in 1982 there were three proposals, one informal and two formal, for amendments to the Draft Convention to allow coastal states to require authorization or notification for the passage of warships. During the discussion, the Philippine delegate noted that “over 80 delegations had expressed concern about the issue,” apparently referring to remarks made during the informal discussions taking place at the time. Third United Nations Conference on the Law of the Sea (11th Sess.) at 85, U.N. Doc. A/Conf.62/16, U.N. Sales No. E.84.v.2 (1984). This comment was followed immediately by a statement from the representative of Romania: “[M]ore than 80 delegations had raised the issue and 47 countries had called for negotiations during the plenary debates.” Id. at 85-86. Argentina’s representative suggested that those in favor of authorization or notification were a majority of the conference. Id. at 31. Those favoring the innocent passage of warships would not be likely to express concern about the issue since the draft as it stood was entirely satisfactory to them.

The second of the two formal proposals was a compromise, cosponsored by 28 states, to add “security” to the interests that the coastal state could protect by the regulatory authority provided for in Article 21. Third United Nations Conference on the Law of the Sea (11th Sess.) at 225, U.N. Doc. A/Conf.62/L.117 (1982). This amendment was widely interpreted and generally understood to satisfy coastal states’ demands for an authorization and notification require-
States as having regulations requiring authorization or notification.²⁵ Professor Shao has said that another 12 states should be added to the 39 recognized by the United States. In total, this would indicate that at least 63 states, perhaps more,²⁶ consider that they have authority over the passage of warships that is inconsistent with the concept of innocent passage. In light of this figure, it may be recalled that a significant minority of judges of the International Court of Justice asserted in the Fisheries Jurisdiction Case, when a similar number of states did not accept 12 miles as the maximum limit of coastal state fishery jurisdiction, that it was not possible to conclude that this limit was fixed by customary international law.²⁷ While there may be disagreement about the meaning to be attached to these indications of state practice and their assessment by the ICJ, the Restatement provides not even a hint of any potential disagreement on the matter. Reporters' note 2 in section 513 includes only the most general reference to the dissent during the conference and makes no mention at all of the inconsistent state legislation.


²⁷ In a joint separate opinion five of the majority of ten in this case stated:

If to the 30 to 35 States which have already extended their fisheries jurisdiction beyond 12 miles, there is added the further number of 20 to 25 States which have taken the attitudes described in the preceding paragraph, [States which have made or agreed to proposals for a 200-mile exclusive economic zone], the conclusion would be that, today, more than half the maritime States are on record as not supporting in fact and by their conduct the alleged maximum obligatory 12-mile rule. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 1, 49-50. Read literally, this statement could mean that a total of 50 states might be sufficient to reject a contention of customary law. Of course, it can be argued that the attitude of states participating in the Third Law of the Sea Conference ought to be determined solely by their ultimate acceptance of the treaty at the end of the conference and their decision to sign the Convention. However, this method of accounting cannot discount state practice evidenced by national legislation inconsistent with the treaty. Furthermore, it seems highly likely that states' actual expectations concerning specific treaty provisions are not reflected in their acceptance of the treaty as a whole until they have ratified the agreement.
Two other areas which provoke questions about the Restatement's declarations of customary law are those on baseline delimitation and the nationality of ships. The former is of interest because it is an important global issue and the latter because of the recently concluded Convention on the Conditions of Registration of Ships, produced under the auspices of UNCTAD. There is a legitimate question whether any useful state practice exists in either of these areas, but the Restatement fails to consider this possibility.

The treatment of these issues is curious. Although the entire section on the law of the sea is compressed into 4 pages of black-letter rules embedded in 140 pages of comments and notes, it still seems less than adequate to devote only one page of comments and two pages of reporters' notes to the extensive body of Supreme Court decisions concerning baselines in the context of federal-state boundaries. For whatever reason (probably the jurisdictional competence of the Court rather than any intrinsic importance as legal questions), the Court has devoted as much or more attention to these issues than to any other in the law of the sea, and has consistently relied upon the provisions of the 1958 Convention on the Territorial Sea and Contiguous Zone for guidance.

A greater focus on baseline issues would have been valuable because there is doubt whether some of these principles, despite their appearance in the 1958 and 1982 conventions, are actually followed in state practice. The evidence is that state practice around the globe departs significantly from the general principles for straight baselines found in both agreements. Thus, there is a serious question whether the provisions on straight baselines found in these agreements reflect customary international law, or whether there is any useful international law on these matters at all. It is one thing for the U.S. Supreme Court to be guided for


30. Prescott notes that the level of generality in existing prescriptions places little if any restriction on states in selecting baselines. J. Prescott, The Maritime Political Boundaries of the World 63-64 (1985). Professor Douglas Johnston's comment is not much different: "State practice in the post-conference years has not encouraged hopes that all coastal states will delineate straight baselines in strict compliance with article 7." D. Johnston, The Theory and History of Ocean Boundary-Making 114 (1988). The U.S. Supreme Court has adopted for guidance, however, the provisions of the 1958 Convention on the Terri-
domestic purposes by the provisions of a treaty to which the United States is a party, i.e., the 1958 Convention, but it is an entirely different matter to assert that the principles contained in those provisions are followed by other states in a sufficient degree of uniformity for them to be called customary law. The Restatement's brief treatment of the issue cannot begin to be deemed an adequate consideration for purposes of identifying customary law.

In contrast to this terse look at a topic of considerable national and international importance, the Restatement devotes an entire section to the nationality of ships, which subsumes flags of convenience (now termed "open registry") and the concept of "genuine link." The remarkable thing about this treatment is that one would never guess that it is a "restatement" of the law of the state which created the modern concept of flags of convenience, which has most actively promoted the great ease of registry in particular nations and whose nationals are still among the largest investors in vessels using such flags. One might argue that these circumstances are irrelevant and have no significance, but this seems unwarranted in light of the ease with which a restatement of U.S. law finds that customary law embraces the concept of genuine link.

In the substantive discussion in the comments and reporters' notes to this section it is once more very difficult to identify the basis for statements which are apparently intended to declare or identify a legal principle or proposition. For example, it is said that international law requires that a genuine link exist between a vessel and the flag state, but no serious attempt is made to identify connections that fail to constitute such a

torial Sea and Contiguous Zone, supra note 4, a treaty to which the United States is a party. See also G. Westerman, The Juridical Bay 184-87 (1987). Professor Westerman estimates that as many as 40-50% of all coastal states have made straight baseline claims. She believes that many of these claims exceed the limits permitted by article 4 of the 1958 Convention, and that some are actually attempts to avoid the limitations on bays of article 7 of the same Convention. Such massive disregard of the treaty's principles raises a question about the effectiveness of the principles involved.

32. R. Carlisle, Sovereignty for Sale (1981) offers a detailed historical study of the creation and development of flags of convenience for the benefit of the United States. See also Cafruny, The Political Economy of International Shipping: Europe versus America, 39 Int'l Org. 79 (1985), which documents the use of flags of convenience as a competitive device for the benefit of U.S. owners.
Restatement: Law of the Sea

link. In addition, it is implied that ownership by a national is not enough unless other factors are added, but no authority is cited for this proposition.35 The issue of what the concept of genuine link excludes is never addressed, although some factors are identified as establishing such a link.36

In declaring that international law requires a genuine link, it is necessarily assumed that if a vessel is found not to have such a link a sanction is visited upon the ship or flag state. Such an assumption could not be further from the truth. Since the concept of genuine link first appeared in the 1958 Convention on the High Seas,37 the tonnage of vessels flying flags of convenience has increased enormously, one estimate being that the tonnage tripled in the 20 or so years after 1958.38 In recent years, new wrinkles are being added so that even states not generally considered as having open registries, such as the United Kingdom and France, have permitted special internal flags to be established for certain categories of vessels.39 None of this data is consistent with the notion that a genuine link is required by international law or that the absence of such a link is attended by any significant sanction.

The Restatement makes abbreviated references to the 1986 Convention on the Conditions of Registration of Ships which was originally intended to provide some substance to the concept of genuine link. The theory

35. Restatement (Third) § 501 comment b.
36. See id.:
   [I]n determining whether a "genuine link" with the state of registry exists, the following additional factors are to be taken into account: whether the company owning the ship is owned by nationals of the state; whether the officers and crew of the ship are nationals of the state; how often the ship stops in the ports of the state; and how extensive and effective is the control that the state exercises over the ship.
   During the three-year period from 1 July 1984 to 1 July 1987, the number of ships flying open-registry flags showed an increase of 8.4 per cent, from 6,615 to 7,169. The total deadweight tonnage registered under open-registry flags increased by 6.8 per cent, from 202.5 million dwt to 216.4 million dwt, while the world merchant fleet decreased from 674.5 million dwt to 632.4 million dwt or by 6.2 per cent. Thus, the share of open-registry fleets in the total world deadweight tonnage increased from 30.0 per cent in 1984 to 34.2 per cent in 1987. Accordingly, as at mid-1987, total deadweight tonnage under open-registry tonnage was about equal to that registered in developed market-economy countries.
39. Sturmey, The United Nations Convention on Conditions for Registration of Ships, 1987 Lloyds Mar. & Com. L.Q. 97, cites Flags of Convenience Aflutter, Economist, July 12, 1986, at 68, which reports that the major purpose of these internal flags is to lower crew costs while retaining the same nationality.
underlying the development of this treaty was that open registries were an obstacle to the development of national fleets by developing nations and their use should be restricted. By the time of its final negotiation, however, the 1986 Convention placed very little restriction on the use of an open registry. The principal standards for registration mentioned by that Convention are so vaguely and generally framed that any state seriously interested would have no difficulty in devising legislation to meet these standards, while leaving registration open to all comers.40 In the end the Restatement offers no useful guidelines for determining the minimum conditions for a genuine link. The result is that what the Restatement enshrines as its first exposition of black-letter law has so little content (and virtually no serious application) that it hardly deserves to be called law at all.

If this treatment seems quixotic, the Restatement's treatment of section 512 descends to yet another level. This section deals with the important principle that "[s]ubject to Section 513, the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory."41 The point noted here concerns the discussion in the comment and the reporters' notes to this section. Approximately one-third of the comment is devoted to the question of access to ports, but of the seven pages of reporters' notes, five of them deal with access to ports. On the basis of the relative space allotted, one might infer that this issue was more important than the basic principle restated as section 512 or than the question of innocent passage of warships, each of which merited less than one page of text. Within these five pages there is something for nearly every point of view, but the guiding rule appears to be, despite a small mountain of contrary evidence of state practice and scholarly opinion, that there is a right of access for foreign vessels to enter ports.42

This conclusion is supported mainly by uniform distortion of prior pronouncements on the problem, such as twisting the Institute of International Law's Resolution of 195743 so that it appears to say the exact

40. See Sturmey, supra note 39. This article is an especially helpful commentary upon the 1986 Convention, calling attention to its useful features as well as to the defects noted here. See also A. Behnam, Impacts of New Developments on Non-Resource Uses of the Ocean: Response to Shipping and Vessel Source Pollution (paper delivered at 22nd Annual Conference of the Law of the Sea Institute, University of Rhode Island, June 12-16, 1988).
41. RESTATEMENT (THIRD) § 512.
42. See id. § 512 reporters' note 3.
opposite of its actual message. The same tactic is used in choosing quotations from the principal scholarly treatment of the subject by A.V. Lowe. Lowe says that no customary principle of international law confers a right of access to ports, but he is selectively quoted in the reporters' notes so that the reader might believe the precise opposite. The notes also refer to the views of the Tribunal in the Aramco arbitration, accurately quoting them but neglecting to point out that the views stated had nothing to do with the disposition of the arbitration. The result of the case would have been precisely the same if the Tribunal had not addressed the issue at all. Furthermore, the principle allegedly forthcoming

44. The Resolution states that "subject to the rights of passage sanctioned either by usage or by treaty, a coastal State may deny access to its internal waters to foreign vessels except where they are in distress ...." Id. at 104 (emphasis in original). The Restatement distorts this declaration by appending to it language from the document's preamble stating that the Institute desired "to see States facilitate international communications through the régime of their maritime waters, notably by abstaining from denying access to their internal waters to foreign commercial vessels save where in exceptional cases this denial of access is imposed by imperative reasons ...." Id. at 103. In the Restatement's presentation, the preambular "desiring" is appended as a purported qualification of the right to deny access. According to the Restatement, the Institute of International Law "affirmed the right of access to ports, subject to certain conditions." Restatement (Third) § 512 reporters' note 3. This is a ridiculously egregious misreading of the Institute's position.


46. In this instance the reporters' notes simply omit the following statement by Lowe: Clearly, the 'great principle of public international law' set forth in the Aramco case had no substantive basis, and customary law establishes no basis for a right of entry into maritime ports. In other words, a coastal State may close its ports to foreign shipping whenever it chooses, subject only to any rights of entry granted under treaty. Id. at 621. The Restatement is careful to include its apparently supporting quotations from the Lowe article after a "but see" signal, which should lead the curious reader to check out this seeming discrepancy. A more forthright approach would simply have been to note that Lowe's conclusions do not affirm a right of access to ports.


48. Restatement (Third) § 512 reporters' note 3.

49. See Lowe, supra note 45, at 599. The principal issue in the Aramco arbitration was the meaning of the concession agreement, not the authority of the Saudi government under international law. 27 Int'l L. Rep. at 172. Having decided that the later agreement with Aristotle Onassis was in conflict with Aramco's rights under the concession agreement, the dictum on Saudi Arabia's rights under international law were wholly unnecessary to the decision and could have been omitted. It is, in any case, ludicrous to state, as did the Tribunal, that Aramco, by virtue of the rules of the Law of Nations [according to which a state can only limit access to its ports when its vital interests require], is plainly entitled to sell its oil and its products to any purchasers it chooses, under such terms and conditions as are agreed upon with them, and thus to conclude f.o.b. sales, in which tankers are supplied by the buyers. Id. at 212. The issue in the arbitration concerned respective rights under the concession agreement, not under public international law, and a nonexistent "rule" of the law of nations obviously could not have the effect ascribed to it. It would appear that the Restatement is attempting to resuscitate the Tribunal's alleged rule and, perhaps, the consequences which would follow therefrom. (It should be noted that this author, in association with Professor Myres McDougal, served as counsel to Saudi Arabia in the arbitration.)
from the Tribunal’s views would not have resolved the case even if nothing else had been involved. Moreover, as Lowe points out, the Tribunal’s invocation of the principle is mistaken in any event.50

In a later discussion51 the Restatement takes cursory account of the decision in the Case Concerning Military and Paramilitary Activities in and against Nicaragua,52 but there is no mention in this section of the Restatement that the majority opinion in that case appears to confirm that states have complete control over entry of foreign vessels into their ports.53 It was always clear, of course, that one state cannot generally prohibit or hinder the access of vessels to the ports of a third state, as the United States sought to do by mining the ports of Nicaragua. But while the Court pronounced that the United States cannot deny access to its own ports to Nicaraguan vessels, it did so only because the United States is a party to a bilateral treaty which obligates it to permit access.54 The necessary implication is that in the absence of agreement the United States could lawfully forbid access of Nicaraguan vessels to U.S. ports. This is what the United States continues to do at this writing.55 Thus, once again, the Restatement identifies as a principle of customary international law, for reasons that are difficult to decipher, a proposition that has virtually no support in state practice and is widely disputed in the scholarly literature.

Section 511(c) deals with the extent of the continental shelf and follows the Convention in defining that area as being

51. Restatement (Third) § 903 reporters’ note 3.
53. The conclusion that the Court confirms such control is drawn from the manner in which it deals with the U.S. mining of Nicaraguan ports and the denial of access of Nicaraguan vessels to U.S. ports. For the Court’s discussion of the former issue, see id. at 111-12.
54. The Court noted that, by treaty, the vessels of each party had liberty of access to the ports of the other which were open to foreign commerce and navigation. Id. at 140. While the United States had attempted to terminate the treaty and impose a trade embargo which, among other things, would block access of Nicaraguan vessels to U.S. ports, the Court found the U.S. actions to contradict the treaty because the requirement of one year’s notice of termination had not occurred before the embargo went into effect. The Court declared that “[t]he freedom of Nicaraguan vessels, under Article XIX, paragraph 3, ‘to come with their cargoes to all ports, places and waters’ of the United States could not . . . be interfered with during that period of notice, let alone terminated abruptly by the declaration of an embargo.” Id.
55. It is to the credit of the reporters that they also carefully document the U.S. regulations that led to the exclusion of entry into Norfolk of a Singapore flag vessel which had a Polish master and officers, those regulations being “classified and unpublished” and aimed at protecting U.S. security. See Restatement (Third) § 512 reporters’ note 4. While one cannot argue with security as a ground for excluding entry, it does leave some doubt about the effectiveness of the supposed right of entry that is subject to such regulation.
the sea-bed and subsoil of the submarine areas that extend beyond the coastal state’s territorial sea

(i) throughout the natural prolongation of the state’s land territory to the outer edge of the continental margin, subject to certain limitations based on geological and geographical factors; or

(ii) to a distance of 200 nautical miles . . . where there is no continental margin . . . or where the continental margin does not extend to that distance[.]

The Restatement notes that this definition, which is based upon article 76 of the Law of the Sea treaty, has been accepted by the United States and is “now accepted as customary law.”

The problem with this section is the same as noted in other contexts—there is no reference to or discussion of state practice regarding the area beyond 200 nautical miles which might establish that this definition is established as customary law. In fact very few states have declared that the margin beyond 200 nautical miles is subject to coastal state sovereign rights. The Restatement has practically no state practice on which to rest the alleged customary law principle. It is true that this leaves the issue of the limit in an unsatisfactory condition, but is this worse than manufacturing a legal principle when one is felt to be needed? While the reporters believe that article 76 represented a consensus in the negotiations and therefore can now be assumed to represent the general view of states, their elementary analysis cannot result in article 76 being considered customary law. The trouble with their easy approach is that the United States rejected one of the tradeoffs that produced the final text of the treaty, namely article 82 concerning sharing revenues from the area beyond 200 nautical miles, while it now attempts to gain the benefit of the concessions made by others. Given these circumstances, it is unlikely that many states will be amenable to giving the United States the benefit of a declaration as customary law of those parts of the treaty that are not actually supported by contemporary state practice.

56. Id. § 511 reporters’ note 8.
57. This point was sufficiently important that the President of the Third United Nations Conference on the Law of the Sea emphasized it by spelling out the point completely in his final statement closing the Conference:

Even in the case of article 76, on the continental shelf, the article contains new law in that it has expanded the concept of the continental shelf to include the continental slope and the continental rise. This concession to the broad-margin States was in return for their agreement to revenue-sharing on the continental shelf beyond 200 miles. It is therefore my view that a State which is not a party to this Convention cannot invoke the benefits of article 76.

Closing Statement by President Koh, U.N. Doc. A/Conf.62/17, supra note 12, at 136. See also W. Burke, Customary Law as Reflected in the LOS Convention: A Slippery Formula (paper delivered at the 22nd meeting of the Law of the Sea Institute, University of Hawaii, Aug. 3-6, 1987).
Section 514, dealing with the exclusive economic zone, includes the principal innovation of the Law of the Sea Conference that has been widely accepted by states. The *Restatement* treats customary law in this context with unusual care, noting only that the "concept" of the exclusive economic zone and the "basic rules" are now established as customary law.\(^{58}\) The *Restatement* embraces the view that there is "some dispute" about whether particular provisions of the treaty are customary law, including those on highly migratory species in article 64.\(^{59}\) The United States, of course, has its own opinion about the meaning of article 64 and customary law on this point.\(^{60}\) But in any objective sense it is odd to find that a "dispute" exists on the customary law regarding these species when virtually every nation in the world except the United States and the Bahamas believes that highly migratory species are subject to the jurisdiction of the coastal state.

Section 523, entitled "Exploitation of Mineral Resources of Deep Sea-bed," raises an additional interesting question about the customary law of the freedom of the seas. It provides:

(1) Under international law,
   (a) no state may claim or exercise sovereignty or sovereign or exclusive rights over any part of the sea-bed and subsoil beyond the limits of national jurisdiction, or over its mineral resources, and no state or person may appropriate any part of that area;
   (b) unless prohibited by international agreement, a state may engage, or authorize any person to engage, in activities of exploration for and exploitation of the mineral resources of that area, provided that such activities are conducted
      (i) without claiming or exercising sovereignty or sovereign or exclusive rights in any part of that area, and
      (ii) with reasonable regard for the right of other states or persons to engage in similar activities and to exercise the freedoms of the high seas;
   (c) minerals extracted in accordance with paragraph (b) become the property of the mining state or person.
(2) Under the law of the United States, a citizen of the United States may engage in activities of exploration for, or exploitation of, the mineral resources of the area of the sea-bed and subsoil beyond the limits of national jurisdiction only in accordance with a license issued by the Federal Government pursuant to law or international agreement.

58. *Restatement (Third)* § 514 comment a.
59. *Id.* § 514 reporters' note 4.
The most interesting point in this section is that comment b appears to be inconsistent with the literal black-letter statement of paragraph (1)(a) that no state may claim or exercise exclusive rights over any part of the sea-bed beyond its national jurisdiction. Comment b invokes high seas fishing as an analogy to sea-bed mining and then states:

No state may assert or grant an exclusive right to exploit any area of the deep sea-bed, and no sea-bed mining enterprise may prevent another from mining an area not yet being exploited by it, just as a fishing vessel may not stop another vessel from spreading its nets or traps in an unoccupied area. However, as a fishing vessel may not interfere with nets or traps already put in place by an earlier occupant, a would-be miner may not interfere with a mining activity already begun by another state's enterprise. *A claim by a state or a person that it has begun a mining activity and can, therefore, exclude others, must be limited in scope, area and duration to the extent strictly necessary.*

The question that arises is what exclusion is “strictly necessary” after a mining operation begins. This would seem to depend upon what area must be considered within a claimant’s site in order for the mining activity to be a profitable economic operation. If the Restatement means that a miner is protected only on the spot actually being worked at a particular moment in time, then there might well be insufficient or no security for the activity, so that it could not be expected to yield a return on investment. Under such a version of customary law, no mining activity will be undertaken. If, on the other hand, a miner can exclude others from an area and for the duration that is “strictly necessary” for a viable mining operation, *i.e.*, one which can be expected to meet reasonable expectations of a return on investment, the area of sea-bed involved would have to be larger than the area actually in use at any point in time. It would appear necessary, in the latter situation, to recognize “exclusive rights” over a part of the sea-bed beyond national jurisdiction.

The U.S. Deep Seabed Hard Mineral Resources Act of 1980 perhaps sheds some light on this issue. Under this legislation the U.S. government may issue American citizens permits to conduct mining operations when, among other conditions, the area encompasses a “logical mining unit.” This is defined as:

an area of the deep seabed—

(I) in which hard mineral resources can be recovered in sufficient quantities to satisfy the permittee’s estimated production requirements over the initial 20-year term of the permit in an efficient, economical, and orderly

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61. Restatement (Third) § 523 comment b (emphasis added).
manner with due regard for conservation and protection of the environment, taking into consideration the resource data, other relevant physical and environmental characteristics, and the state of the technology of the applicant set out in the recovery plan;

(II) which is not larger than is necessary to satisfy the permittee's estimated production requirements over the initial 20-year term of the permit; and

(III) in relation to which the permittee's estimated production requirements are not found by the Administrator to be unreasonable.63

It is my understanding that a permit issued under these conditions is considered by the United States to be an exercise of the freedom of the sea which must be recognized by other states. If this is the case, it appears, using the standard in comment b of the Restatement, that the claim would involve exercising an exclusive right vis-a-vis nationals of other states over a specified portion of the sea-bed beyond national jurisdiction. If that is the meaning contemplated by the Restatement, the analogy to fishing on the high seas no longer holds, and it becomes necessary to rephrase section 523(1) to clarify what is actually being done: the exercising of exclusive rights over certain sea-bed areas beyond national jurisdiction.

Of course, most nations in the world do not accept the view that customary international law permits individual nations, under the protection of freedom of the seas, to engage in deep sea-bed mining beyond national jurisdiction.64 The Restatement's approach to this issue is intriguing in its unevenness. In other sections of Part V, the notion is accepted, and even urged, that the views of states, as allegedly expressed in the Law of the Sea treaty provisions, must be taken into account in determining the content of customary law. Occasionally, those provisions appear to be all that matter. On issues relating to deep sea-bed mining, however, it is apparently no longer important that many states have

63. Id. § 1413(a)(2)(E)(ii).

64. The last formal statement of the Third United Nations Conference on the Law of the Sea was President Koh's address during the final session. He identified the major themes of the concluding statements of the 121 nations. He said:

The fourth theme relates to the lawfulness of any attempt to mine the resources of the international area of the sea-bed and ocean floor. Speakers from every regional and interest group expressed the view that the doctrine of the freedom of the high seas can provide no legal basis for the grant by any State of exclusive title to a specific mine site in the international area of the sea-bed. Many are of the view that article 137 of the Convention has become as much a part of customary international law as the freedom of navigation. Any attempt by any State to mine the resources of the deep sea-bed outside the Convention will therefore earn the universal condemnation of the international community and will incur grave political and legal consequences.

views of the treaty and of customary law that differ from those of the United States.

It is unfortunate that Part V of the *Restatement* reflects so strongly the political thrust of the pronouncements about customary law issued by the Reagan Administration after it rejected the 1982 Convention on the Law of the Sea. Expanding the rule of law in international affairs is unquestionably worthy and important, but it is not a service to that goal for allegedly objective observers to endorse official views about customary law irrespective of the amount or probity of the evidence supporting those views. It is an understatement to acknowledge that customary law is anything but a certain, easily identifiable proposition. But even granting that, Part V goes too far. It seems likely that the purpose of the *Restatement* was to try to avoid or attenuate the potentially costly effects of the misjudgment of the Reagan Administration on the Law of the Sea Convention, but this effort is misguided and misplaced.

65. Apparently this practice was consciously adopted by the reporters, or so at least one outside observer has stated. Rejecting any notion of sole reliance by the United States on the international law of the sea created by or derived from state practice, Professor Oxman has written:

> What then is the alternative? At least with respect to those parts of the LOS Convention that President Reagan found compatible with United States interests, we should explicitly embrace the text as expressly declaratory of general international law. *We should do so even if it is not, because we have nothing better to use as a persuasive source of rules of restraint.* The American Law Institute's reporters are to be congratulated for taking that approach in the Draft Restatement of the Foreign Relations Law of the United States.


Assuming Professor Oxman's congratulations are deserved, advocacy is hardly acceptable when it is smuggled in under the guise of scholarship seeking to identify customary international law as it might be applied by a disinterested international tribunal. In this connection the reporters' notes are said to represent the views of the reporters, *Restatement (Third)* vol.1 at xi, while the introductory notes, the black-letter rules, and the comments are the views of the American Law Institute and allegedly meet the standard of scholarship just noted. As discussed in this review, some of the black-letter rules and comments do not meet this standard. The Institute's distinctions are an effort to make it acceptable for the reporters to act as advocates in their notes. Although this position is not precluded, self-identification of the advocacy role would appear desirable and should have been required.

There is the possibility that Professor Oxman's statement applied only to draft versions of Part V of the *Restatement*, and the conscious, but concealed, advocacy approach was later dropped. If this is the case, the change does not appear to this reviewer to have been successful.